BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of the
Reserve Account of:

CUSTOM CONTROL SENSORS
(Employer)
c/o M&M Association

PRECEDENT
RULING DECISION
No. P-R-468
Case No. R-89-00098

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Claimant: E. P. Alcomendras
SSA No:
BYB: 01019

Office of Appeals No. LA-R-09613

The employer appealed from the decision of the administrative law judge which held that the employer's reserve account was subject to benefit charges.

STATEMENT OF FACTS

The claimant worked for the employer as an assembler for six months, earning $5 an hour at the time of separation. His job ended on July 28, 1988.

On September 12, 1989 the Appeals Board, on its own motion, received the following as Appeals Board exhibits:

1. Pre-Claim Computation, dated April 21, 1989;
2. DE 1545, Notice of Claim Filed & Computation of Benefit Amounts, dated February 21, 1989;
3. DE 1080, Notice of Ruling, dated April 21, 1989;

4. Termination Questionnaire, dated July 28, 1988; and

5. Employee Corrective Notice/First Warning Notice, dated July 27, 1988.

The Appeals Board solicited, but did not receive, written argument from the parties on this case following its September 12, 1989 meeting. Based on the record before us, we make the following findings.

The claimant's supervisor gave the claimant a written warning on July 27, 1988 that his attendance had been unsatisfactory. The written warning explained to the claimant that he had failed to notify his supervisor the required minimum of one hour before the start of shift the previous two days, July 25 and July 26, that he was going to be unable to report for work. The claimant had received a verbal warning for the same problem a month earlier. The written warning informed the claimant that he could be further disciplined for another similar violation of the employer's rules.

The claimant signed the written warning and agreed to its contents. He was given an opportunity to dispute the warning but did not do so.

The claimant arrived at work the next day, July 28, 1988, but resigned on thirty minutes' notice. He completed a termination questionnaire that day telling the employer in check-off boxes that he had another job at higher pay with fewer hours. He mentioned in response to a question about any unsatisfactory job conditions that he needed "more opportunity". He did not volunteer the identity of the new employer, and he did not answer a question about how much he would be earning there.

The claimant filed a new claim for unemployment insurance benefits effective January 1, 1989. Since some of the claimant's base period wages for that claim had been paid by this employer, approximately 40 percent of his total wage credits, the Department issued the employer a Notice of Claim Filed on February 21, 1989. The employer's agent submitted a timely response protesting charges to its reserve account, and questioned whether the claimant in fact had a definite starting date for this "alleged new job" at the time of the quit and whether the new job was indeed better. The protest also requested that the Employment Development Department furnish

the name and address of the subsequent employer, and cited as authority sections 1095(c) and 1095(d) of the Unemployment Insurance Code.

The Department did not respond to the employer's request for information. The Department noted on April 21, 1989 in its DE 2403, Record of Claim Status Interview, that it was aware of several subsequent employers for the claimant between the date he resigned work with this employer and the effective date of the claim. The Department, however, could not determine which subsequent job the quit was for. The Department then concluded that there were insufficient facts to establish that the quit was without good cause, and an unfavorable ruling was issued to the employer the same day, April 21.

The Department was apparently obtaining its data on the claimant's subsequent employment from a pre-claim computation, a printout of which is in our record. That pre-claim computation identifies several employers for this claimant in the third quarter of 1988, during the lag period on this claim, by name and account number. The data from this pre-claim computation were not disclosed to the employer.

The employer filed a timely appeal from the unfavorable ruling, and a hearing was subsequently held on June 22, 1989. The employer's appeal repeated its request for information under section 1095 of the code. The Department neither acknowledged the request nor responded to it.

REASONS FOR DECISION

Section 1032 of the California Unemployment Insurance Code provides that an employer's account shall be relieved of benefit charges if it is ruled under section 1030 or 1328 of the code that the claimant left the employer's employ voluntarily and without good cause.

The California Unemployment Insurance Appeals Board held in Precedent Decision P-B-27 that there is good cause for the voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

In Precedent Decision P-R-15, the Appeals Board held that where an employer introduces evidence of subsequent employment at a lower wage, the employer has thereby established a prima facie case of a leaving without good cause; and the burden of

introducing further evidence to establish the claimant left with good cause shifts to the Department. If the Department produces no further evidence or insufficient evidence to establish the claimant left with good cause, the employer's account is relieved of benefit charges.

In Precedent Decision P-R-376, the Appeals Board held the employer is entitled to a presumption that the claimant left its employ without good cause when in response to the employer's inquiry, the claimant refused to give any reason other than she was leaving for personal reasons, because the employer, in such a case, is not required to probe into those reasons.

In Precedent Decision P-B-228 the facts indicated that the claimant would probably have been discharged if she had not resigned, but the employer had taken no affirmative step to discharge her. The Appeals Board held that the claimant left her employment voluntarily and without good cause.

Subsections (c) and (d) of section 1095 of the Code provide in pertinent part that the Department shall permit the use of any information in its possession to the extent necessary for the purpose of furnishing an employer, or his or her authorized agent, with information to enable him or her to discharge fully his or her obligations or safeguard his or her rights under this division of the code. The Department shall also permit this use of information to enable an employer to receive a reduction in the contribution rate. (emphasis added)

The Court of Appeal in California Portland Cement Company v. California Unemployment Insurance Appeals Board (1960), 178 Cal. App. 2d 263, 3 Cal. Rptr. 37, dealt in passing with the consequences of the Department's failure to respond to a section 1095 request by an employer. Although the court noted that the employer in that case had made no such request, the court observed that if the request had been made it would have been the duty of the Department to have furnished the employer with all information in its possession bearing on the question whether the claimant quit his employment voluntarily and without good cause. Otherwise, said the court, ". . . a serious question of due process would be presented" (178 Cal. App. 2d, at 275).

Evidence Code Section 412 provides that less weight should be given to evidence that is offered when it was within the power of the party to produce stronger and more satisfactory evidence.

Evidence Code Section 413 provides that an inference can be drawn from a party's failure to explain or deny evidence against him or her or the party's wilful suppression of evidence related to the case.

Evidence Code Section 664 provides that it is presumed that official duty has been regularly performed.

In Precedent Decision P-B-262, the Appeals Board held that under Evidence Code Section 664, it is presumed that the Department had reached its determination only after a careful investigation of the facts and that its official duty in determining the claimant's eligibility for benefits had been properly performed. It concluded that the employer had not met the burden of overcoming this presumption of regularity.

We are unwilling in this case to invoke the usual presumption that the Department's original examination of this matter was done only after a careful investigation of the facts and that its official duty was properly performed. The record reveals that one of several employers whose names and reserve account numbers appear on the pre-claim computation could have been the employer who hired the claimant after he quit work with this employer. Had the employer in this case been provided with the identity of these subsequent employers, this employer could have obtained such useful information as the new date of hire, the rate of pay, and any other information that might bear directly on whether in fact this claimant left work for better employment somewhere else.

Since the employer in this case twice requested this information from the Department well ahead of time, under a section of the code that was specifically designed by the Legislature to mandate the production of such discovery from the Department, we conclude that the Department's failure to provide this information violated the statutory mandate and constituted a denial of due process (see California Portland Cement, supra).

The importance of this employer having access to information potentially capable of reducing its reserve account exposure is heightened by the possibility that the claimant in this case resigned not because he had a better job, but because he had been disciplined again for his poor attendance. The former contention would probably result in an unfavorable ruling, but the latter would not.

We perceive no violation of confidentiality issue here (cf. Carleson v. Superior Court (1972), 27 Cal. App. 3d 1, 103 Cal. Rptr. 824), in view of the express language used by the Legislature to provide for this right of discovery.

We would not find a denial of due process on every set of facts in a ruling case brought before us. If, for example, it were apparent from the record that the claimant was discharged for an act of insubordination, the Department arguably would not have any information in its possession which would bear on that discharge, and the employer would still be required to meet its burden of proof in that situation. Similarly, if it were determined from the record that there was other significant evidence to show that, for example, the claimant left work with the interested employer in order to take a job with another employer at a substantial increase in salary, the fact that the Department had not at the same time complied with the employer's section 1095 request would not necessarily mean that the burden of proof had been shifted back to the Department.

In the case before us, however, the facts are clear. The employer requested that the Department comply with the mandates of section 1095 of the code. Prompt compliance by the Department would have produced, among other things, the identity or identities of the claimant's subsequent employer or employers. This would have enabled the employer to produce evidence at the hearing about whether in fact the claimant's subsequent work was a better job within the meaning of Precedent Decision P-R-15, assuming the claimant had another job at the ready on July 28, 1988, or, on the other hand, whether the claimant merely left work in response to a written reprimand and offered the excuse of other work as a pretext. Under these circumstances, we think that the Department's noncompliance with section 1095 of the code requires that a favorable ruling issue to the employer.

We therefore hold that where an employer submits a written section 1095 request to the Department for claim information within the Department's possession which has a reasonable potential for reducing the employer's contribution rate, and where the Department fails to comply with that request, the employer is entitled to a favorable ruling.

DECISION

The decision of the administrative law judge is reversed. The employer's reserve account is relieved of benefit charges.

Sacramento, California, January 18, 1990.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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